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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 22 2005
SRC 03 091 52464

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral fellow at the University of Texas Health Science Center, San Antonio (UTHSCSA). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The

> burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel states that the petitioner "belongs to the group of pioneers making significant scientific breakthroughs while utilizing the discovery and knowledge of death genes, or programmed cell death – a process that is termed 'apoptosis.'"

The petitioner submits several witness letters, examples of which we shall discuss here. Three of the seven witnesses are UTHSCSA faculty members; a fourth has collaborated with the petitioner in his work at UTHSCSA; and a fifth supervised the petitioner's doctoral studies at Beijing Medical University (now Peking University Health Science Center). The remaining two witnesses do not specify how they became aware of the petitioner's work. Dr. [redacted], an associate professor at UTHSCSA, supervises the petitioner's postdoctoral work at that institution. She states:

> [The petitioner's] current research involves the evaluation of the mechanism of apoptosis induced by two novel antitumor drugs, namely irofulven and oxaliplatin. Cancer fighting drugs are thought to act through the interaction with the DNA, however some of them also interfere with the protein function. Our own studies and studies performed with collaborators have shown that both interaction with DNA and protein play a role in the apoptosis initiated by these drugs. So far the research has been extremely helpful in demonstrating that dual reactivity with DNA and proteins can lead to: (i) potent apoptosis in tumor cells . . . ; (ii) profoundly different [non-lethal] responses in normal cells . . . ; (iii) by-passing the common blocks to apoptosis often responsible for a clinical failure of currently used anti-tumor agents. . . .
>
> [The petitioner] is one of the key researchers for my projects. He is a recognized and accomplished scientist. I feel that his continued long-term involvement in these important projects is absolutely essential for their continuation.

Dr. [redacted], one of the petitioner's collaborators at UTHSCSA, states:

> It is vitally important to understand exactly how and why these drugs kill, not only to better target them to the appropriate patient and cancer type (i.e., prostate, breast, pancreatic) but also to guide the development of new and better drugs for the patient suffering cancer.

> [The petitioner's] work build on an initial simple observation that cell protein is bound by these dual action drugs. His evaluation of how the drugs trigger the cell's natural death machinery, the apoptotic process, focuses on the timing of the cellular events. Consequently, his studies have vitally impacted the development of clinical protocols and dosing schedules for these investigated drugs. [The petitioner's] meticulous and innovative work is crucial in pinpointing both critical proteins and critical cellular organelles as targets for these drugs. His work underway to validate these findings in animal models will further favorably affect the clinical patient in both developing new drugs and fine-tuning treatment regimens to maximize efficacy and minimize side effects in the cancer patient.
>
> [The petitioner] has made key and significant contributions in the study of dual action drugs.

Dr. [redacted] senior director of Research and Development at [redacted] (which manufactures irofulven), states that the petitioner "was the first to demonstrate the early initiating events of irofulven-induced apoptosis . . . in human tumor cell lines." Dr. [redacted] states that the petitioner "has contributed to the scientific understanding of antineoplastic drug action and has implications for improved clinical treatment options."

Dr. [redacted], an associate professor at Meharry Medical College, lists the petitioner's various projects and concludes that the petitioner "has received international recognition for his work," but does not elaborate. Dr. [redacted] technical director at Worthington Biochemical Corporation, states that the petitioner plays "an integral role in the development of a potentially useful drug for the treatment of a very common and serious type of cancer." In the context of his other comments, Dr. [redacted] appears to refer to prostate cancer.

The director instructed the petitioner to submit additional evidence to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. In response, the petitioner states "on February 17, 2003, I was transferred to [redacted] lab" at UTHSCSA. The petitioner states: "Dr. [redacted] lab is very strong in aging research. . . . So I can continue and expand cancer research in [the] aging field." The petitioner states that his new work involves "mitochondria protein turnover" and "establishing a cell line that over-expresses PGC-1 gene," a gene relating to aging, obesity, and diabetes. The petitioner, in describing his projects, does not mention cancer or cancer drugs.

A petitioner must establish eligibility at the time of filing. If the alien was not eligible at the time of filing, subsequent developments cannot cause the alien to become eligible. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Therefore, if the petitioner was not already eligible at the time of filing, then his work with Dr. [redacted] cannot qualify him for a waiver in the present proceeding. We consider the petitioner's subsequent work only to the extent that it may establish the extent to which the petitioner has continued to serve the national interest in the same way described in the initial filing.

Dr [redacted], research health scientist at UTHSCSA's Geriatric Research Education and Clinical Center, states: "Prior to joining our lab in 2003, [the petitioner] was doing cancer related research and he had several impressive publications in this area." This wording supports the conclusion that the petitioner has ceased performing research directly related to the treatment of cancer. Dr [redacted] adds that the petitioner's "continued long term involvement in these important projects is absolutely essential to their success." Dr. [redacted] had previously used almost exactly the same phrase in relation to the petitioner's work, five months before the petitioner left Dr. [redacted] laboratory and thereby ceased his

involvement in her projects. Dr. [redacted] had stated that the petitioner should receive a waiver because, otherwise, the process of attempting to recruit and train a replacement would significantly delay the progress of the project. Now that the petitioner has left Dr. [redacted] laboratory, presumably necessitating the hiring and training of a replacement, the petitioner's new supervisors make the same argument.

The cessation of the petitioner's cancer research is not intrinsically fatal to the outcome of the petition. The petitioner continues to work in the same overall field. What is most important at this point is to determine the extent of the impact that the petitioner had on his field up to the filing date, from which we can, to some extent, project his likely future impact on that field. The petitioner, in his response to the director's notice, included no new evidence to establish that his overall track record as of the filing date was of a caliber that would warrant a national interest waiver.

The director denied the petition, stating that the evidence "does not establish that [the petitioner] has made significant research achievements." The director added that an alien's choice of an important research specialty is not sufficient grounds for a waiver.

On appeal, counsel states that the petitioner "is not only a major contributor but spearheaded the research on the caspace-mediated apoptosis and caspase-independent cell death induced by irofulven in prostate cancer cells." The record contains the manuscript of a scholarly article, and information indicating that the article had been accepted for publication in *Molecular Cancer Therapeutics*. Counsel states that this acceptance is "a very prestigious feat and unmatched by any available U.S. worker." Counsel presents absolutely no evidence to support the claim that no available U.S. worker has had an article accepted for publication in *Molecular Cancer Therapeutics*, or that publication in that journal is substantially different from publication in any of a number of other scholarly journals relating to the petitioner's work.

Apart from the unsubstantiated claim that acceptance of an article for publication in *Molecular Cancer Therapeutics* is, on its face, a prestigious achievement, counsel focuses on the petitioner's now-abandoned work in cancer drug research. Counsel states:

> The formula of $E=MC^2$ as crafted by [redacted] was invented in a small laboratory during the World War II so could [the petitioner] working at his laboratory at one of the prestigious and leading research institutes i.e. University of Texas Health Sciences Center, could lead to a true solution toward the treatment of cancer.

(Sic.) The record is utterly devoid of any indication that anyone other than counsel compares the petitioner's work with irofulven to Einstein's formulation of the famous equation $E=mc^2$ (an event that took place in 1905, while Einstein worked as a patent clerk, rather than "in a small laboratory during . . . World War II"). The idle speculation that the petitioner's work may one day be compared with that of Einstein cannot take the place of actual evidence. We note, further, that the petitioner did not invent irofulven; he is, rather, one of a number of researchers who have studied its effects. The petitioner is in no way responsible for the existence of the drug.

Counsel states:

> You also stated in your letter that [the petitioner's] sphere of influence does not extend far beyond his colleagues. However, the nature of science research is not limited by the actual geographic locations by the researcher himself rather it is the intrinsic manner of one's

research coupled by its innate potential as well as perspective application that can dictate the influence and sphere of influence of one's research.

(Sic.) Counsel is correct that a researcher's work *can* have influence around the world, but this general principle does not show that this particular petitioner's work *has* had a significant influence outside of the university where he has worked and the pharmaceutical company that has bankrolled his research. The petitioner, on appeal, shows that one of his articles has been cited six times since its January 2002 publication; two of these six are instances of self-citation by the petitioner or his co-authors. An earlier article by the petitioner, relating to work he had performed at Tel Aviv University, shows five citations since its February 2000 publication date. The petitioner has submitted nothing to show, objectively, that nine independent citations over the course of more than four years indicate a rare level of impact and influence in the field.

The petitioner is clearly a productive researcher whose efforts are valued by those most closely involved in his work. The record, however, contains no objective indication that the United States has benefited, or is likely to benefit, from the petitioner's actions to such an unusually great extent that it is in the national interest to exempt him from the job offer/labor certification requirement that normally attaches to the immigrant classification that the petitioner has chosen to seek.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.